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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|---|---|---|---|
| 09/838,809 | 04/20/2001 | Grant E. DuBois | 04286.00010 | 3526 |

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| EXAMINER | |
|---|---|
| PADEN, CAROLYN A | |
| ART UNIT | PAPER NUMBER |
| 1761 | |

DATE MAILED: 08/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 09/838,809 | DUBOIS ET AL. | |
| | Examiner | Art Unit | |
| | Carolyn A. Paden | 1761 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *27 June 2005*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *13,14,16,17,19,20,23,26-28,31,34-37,40,42,43,54-102,106-111* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *all* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

The rejection of the claims under 35 USC 112 has been dropped for the reasons argued by applicant.

The rejection of the claims under 35 USC 102e over Broz has been dropped for the reasons argued by applicant in their discussion of the declaration filed under 1.131.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 13, 14, 16, 17, 19, 20, 23, 26-28, 31, 34-36, 37, 40, 42, 43, 55-58, 60, 62, 64-67, 69, 71, 73-76, 78, 80, 82-85, 87, 89 & 106-111 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stefandl in view of Beyts.

Stefendl discloses a freezer altering additive composition for use with commercial beverages. The composition is made from 1) carbohydrate; 2) glycerol or propylene glycol and 3) a sugar alcohol such as sorbitol and erythritol (see claim 1). The beverages are ready-to-drink composition such as cola and cream soda (paragraph 33). Artificial sweeteners, such

as aspartame, saccharin and acesulphame K are also contemplated in the product (paragraph 0033). The freeze altering composition is simply added to the bottle and the bottle is tossed into the freezer (note sample D at paragraph 53) and sample D forms a slush beverage. Although not specifically stated, cola and cream soda are well known in the art to be carbonated beverages. The dispenser, in this case, is the bottle in the freezer. The concept of using more than one polyol and salt is shown at Example 3 and Table 1. The claims appear to differ from Stefandl in the inclusion of a high intensity sweetener in the product examples and in the recitation that sugar alcohols are sweeteners. Beyts teaches that sucralose is a high intensity sweetener that has a synergistic relationship with sweet saccharides. Beyts also shows that sugar alcohols are sweeteners. Thus one of ordinary skill in the beverage art would have been able to modulate the sweetness of Stefandl by adjusting the amount and type of sweetener in the product. It is appreciated that the given freezing point of the product is not mentioned in the reference. But no difference is seen between the freezing point of the beverage of the claims and the freezing point of Stefandl.

Applicant has filed a declaration under 35 USC 1.131 but the date of the notebook page does not appear to predate the Stefandl application.

Applicant has also filed an amendment to the claims to suggest the intended use of the product is for mechanically mixing. The intended use of the product does not alone carry any patentable weight. The product of Stefandl remains slushy in the freezer. So even if the product could be used in a bottle, there is not suggestion in the reference that it could not be used in a mechanically stirring freezer.

Claims 13, 14, 20, 23, 28, 31, 37, 43, 54-90 and 106-110 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich (3,286,829) in view of Beyts (5,380,541) for reasons of record.

Applicant argues that Marulich does not show a slush beverage for use in a mechanical mixer. This argument has been considered but is not persuasive because the claims merely require that the beverage could be used in a mechanical mixer. No difference is seen between the beverage composition or process of the claims and the beverage and process of the reference. The composition in Marulich freezes to a slush state so even though one may use it at home, there is not preclusion that the product could not be used in a commercial slush freezer.

Claims 16, 17, 26, 34 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts as applied to claims 13, 14, 20, 23, 28, 31, 37, 43 & 54-90 above, and further in view of Cole for reasons of record.

Applicants' arguments are related to the independent claims discussed above.

Claims 19, 27 & 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to claims above, and further in view of DeCock for reasons of record.

Applicants' arguments are related to the independent claims discussed above.

Claims 97-102 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole and DeCock as applied to claims above, and further in view of Anderson for reasons of record.

Applicants' arguments are related to the independent claims discussed above.

Claim 42 is objected to because of the following informalities: Claims 42 depends from cancelled claim 39. Appropriate correction is required.

It is noted that ten references were cited in the International search report as X references. Examiner has previously viewed these references but has not applied them in this action because they are not better references than those already applied against the claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is

available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Carolyn Paden 8-2-05

CAROLYN PADEN
PRIMARY EXAMINER 1761